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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 60

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DURHAM, Trustee of the Estate of ROBERT L. KWETKEN, Bankrupt, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 845

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, Trustee of the Estate of ROBERT L. KNETZER, Bankrupt, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Respondent takes issue with the first question presented by Petitioner. Ordinarily, rulings by the Court on evidentiary matters may be considered by the Circuit Court of Appeals, even though no cross-appeal is filed. However, this rule does not apply where to do so would enlarge the rights of the Petitioner over and above the judgment rendered in his favor and further, where the opinion shows that such matters were given full consideration by

the court. The statement in the opinion that the affidavit of the Bankrupt was not considered because no cross-appeal was filed is mere dicta and is not decisive of the issue involved because of the reasoning of the Court. Further, the law is clear that such affidavit was not admissible in the first instance. The opinion of the Court was correct.

As to the second question presented, Respondent contends that since he was following the mandate of the District Court in collecting moneys on a turn-over order, which said order specifically found that the Bankrupt had the money and assets in his possession, that he had a right to assume that any payments made to him were made upon said turn-over order out of the concealed assets held by the Bankrupt, and that the Trustee was under no obligation to trace down each and every one of such payments.

STATEMENT

The turn-over order mentioned by Petitioner (R. 144) found that the Bankrupt "has in his possession or under his control the sum of $250,000.00 which should be turned over to the said William C. Dunham as Trustee for his bankrupt estate as a part of the assets belonging to said bankrupt estate at the time of the filing of the petition of bankruptcy herein, for the benefit of the creditors of the said Robert L. Knetzer."

The statement by Petitioner, on page 3, that the Bankrupt was released from confinement upon his undertaking to locate assets, is not contained in the record. The only reference in the record, on page 166, is to the effect that "upon his release from confinement in jail, attempted to purge himself of a contempt citation by making installment payments to his Trustee in Bankruptcy."

The statement by the Petitioner, on page 3, "in fact his freedom on several occasions was requested by Respondent" (R. 85) is erroneous. Page 85 shows just the opposite to be true, because the Trustee testified that he did not request it but that on some occasions when the Bankrupt was out of jail, he would ask to be permitted to have additional time.

Concerning the statement by Petitioner that the Bankrupt was released from custody, even the Petitioner testified that he noticed in the newspaper that the Bankrupt was supposed to be in the custody of a Marshal and that the Bankrupt told him it was all paper talk and that all he had to do was report from time to time on his whereabouts. (R. 51.) The Court says in its opinion:

"The Court permitted Knetzer to leave the jail

on different occasions in the custody of the United States Marshal or of bailiffs of the court." (App. 3a.)

The record in this case is fairly long and the opinion of the Circuit Court of Appeals fairly accurately reports some of the evidence and the reasons for reversing the judgment. Therefore, without unduly lengthening this statement, we merely call attention to the statement of facts in the opinion.

REPLY TO REASONS FOR GRANTING THE WRIT

A. THE NATURE OF CROSS-APPEALS

The Respondent contends that the decision of this Court is not in conflict with decisions of other circuits nor of this Court. It must be remembered that the reclamation petition filed in this matter asked for judgment against the Respondent in the sum of $36,000.00. The trial court found the issues in favor of Petitioner and allowed the sum of $27,400.00. The affidavit of the Bankrupt, which was stricken from the record by the order of the trial court, said, in effect, that the Bankrupt had turned over to the Respondent the sum of $36,000.00. Therefore, to allow Petitioner to urge without a cross-appeal that the Circuit Court of Appeals should take into consideration said affidavit, would be an effort on the part of the Petitioner to enlarge his rights and lessen the rights of Respondent.

This being a bankruptcy matter, equitable principles apply.

The first proposition relied upon by Petitioner is to the effect that the Petitioner was barred under the circumstances from taking any cross-appeal from the decision of the District Court. We believe that the following cases cited by the Petitioner do not sustain this proposition.

It would appear that Petitioner has erroneously cited the case of *Harding v. Federal National Bank*, 31 F. 2d 914 (1st Cir. 1929), as we believe that it sustains our position. In the first place, the Circuit Court of Appeals said that it found no merit in the plaintiff's cross-assignment of errors. Second, that "the decree appealed from was in his favor and granted him all the relief he sought. His

cross-appeal was therefore improperly taken (citations omitted) and, such being the case, it was not open to him to assign or argue cross-errors."

The case of *In re Schwartz*, 89 F. 2d ed. 172 (2nd Cir. 1937) does not support the position of Petitioner. The appellee received all of the relief which he had sought in the lower court and therefore, his cross-appeal was dismissed.

In the case of *Lanova Corp. v. National Supply Co.*, 116 F. 2d 235 (3rd Cir. 1940) the defendant had judgment entered in its favor on all matters in dispute and the Court properly held that it could not have appealed from the decree given in its favor.

In the case of *United Engineering and Foundry Co. v. Cold Metal Process Co.*, 68 F. 2d 564 (3rd Cir. 1934), cert den. 291 U.S. 675, on the motion of defendant the Court dismissed plaintiff's bill of complaint but because of one finding in the findings of fact the defendant appealed and the Court dismissed his appeal, which, certainly, is not in conflict and has no bearing on the instant case.

In the case of *Aberly v. Craven County*, 70 F. 2d 52 (4th Cir. 1934), the appeal of two of the defendants was dismissed because the decree was manifestly in their favor and the court said that they could not appeal from a decree altogether in their favor.

In the case of *Ottenheimer Bros. v. Libuwitz*, 74 F. 2d 858 (4th Cir., 1935), cert. den. 296 U.S. 582, the Court said: (p. 863)

> "It sometimes appears that when a party has a decree in his favor, but not to the extent prayed for, the decree becomes binding upon him, in so far as it is unfavorable, unless he takes an appeal. In the pending case, however, the defendant was awarded all the relief to which he was entitled, namely, a

dismissal of the plaintiffs' bill, and he was therefore in no position to appeal."

In *Mach v. Abbott Co.*, 136 F. 2d 7 (8th Cir., 1943), cert. den. 320 U.S. 773, the court held that the debtor could not appeal because he had secured by a judgment all the relief which he sought.

In the case of *United States v. Adamant Co.*, 197 F. 2d 1 (9th Cir., 1952), cert. den. 344 U.S. 903 (1952), there is merely the statement that an appeal lies from a judgment, and not from findings, and that in order that a judgment be appealable at the behest of the party the party must be aggrieved by it.

In the case of *Corning v. Troy Iron & Nail Factory*, 56 U.S. 451, 14 L. Ed. 768 (1853) the court said in effect that a court may decree in favor of a complainant but not to the extent prayed for in his bill and he may have just cause of appeal on that account, but where the respondent prayed that the bill be dismissed and, having won such a decree, he cannot have a more favorable one. Therefore, he is not aggrieved by the final decree and cannot appeal.

This case is authority for the proposition that the Petitioner in the instant case was in a position to file a cross-appeal because he did not get all of the relief prayed for in his petition, which we shall discuss later.

In the case of *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934) the United States Supreme Court dismissed the appeal of the defendant, saying that it was successful in the District Court and has no right of appeal from the decree in its favor.

In the case of *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1938) the Circuit Court of Appeals dismissed the appeal on the ground that petitioners had

been awarded all of the relief to which they were entitled, notwithstanding an adjudication of part of their claim. The United States Supreme Court granted certiorari, saying that:

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But where the decree in itself purports to adjudge the validity of claim 1, and even though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated."

Thus, the Supreme Court ordered the Circuit Court of Appeals to consider the appeal on that portion of the decree. We believe that this case is in support of our contention that where a judgment or decree grants only a portion of the relief sought, the other party is under a duty to cross-appeal. In this case the United States Supreme Court definitely did not hold that the defendant was barred from taking a cross-appeal, being the proposition for which this case is cited, but held just to the contrary.

Likewise, the case of *Commissioner of Internal Revenue v. Kelly's Estate*, 84 F. 2d 958 (7th Cir., 1936), cert. den. 299 U.S. 603, cited by Petitioner, being the same Circuit Court of Appeals which decided the instant case, holds that the respondent could not prosecute a cross-appeal because he had received by virtue of the Board's decision all of the relief for which he asked.

We have limited the foregoing to the one proposition that there is absolutely no conflict in either the Supreme Court opinions nor any of the Circuit Courts of Appeal on the proposition that a party is barred from taking any appeal or cross-appeal under circumstances where the decree or judgment has given him all of the relief for which he

prayed. These cases, cited by Petitioner, are not applicable to the instant situation because he claimed $36,000.00 and the trial court allowed him only $27,400.00.

There is no conflict in the decisions of the Circuit Courts of Appeal on this proposition. It is obvious from a reading of the Court's opinion in the instant case that the Court did not state nor did it hold that the appellee was barred from taking any cross-appeal.

The second proposition urged by the Petitioner, being based upon the erroneous assumption that he had no standing to cross-appeal, says that he had a right to urge, in the Court of Appeals, any matter overlooked or ignored by the trial court.

It is significant to note that in the Court's opinion, the Court refers to the fact that the Petitioner was trying to recover $36,000.00, as the Court said:

> "Thus, argues the petitioner, he is entitled to recover the amount of $36,000.00 from the assets in the hands of the trustee."

It is noted that the Court examined the affidavit of the bankrupt, as stated in its opinion, to the effect that he had turned $36,000.00 over to the Trustee, but then says that the Court may not consider the affidavit as evidence because no cross-appeal was taken by the Petitioner. It is therefore obvious that if the Court had considered the claim for $36,000.00 based upon the affidavit, it would have been an attempt by the Petitioner to enlarge his rights.

In the case of *United States v. American Railway Express Co.*, 265 U.S. 425 (1924), Justice Brandeis very plainly states the proposition, with which we do not disagree, that an appellee may urge upon the Circuit Court of Appeals, without taking a cross-appeal, any matters appearing in

the record which were overlooked or ignored by the court. However, Justice Brandeis goes on to say:

> "In other words, the appellee may not attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below."

The case of *Langnes v. Green*, 282 U.S. 531 (1931), cited by Petitioner, is not in point because it deals with admiralty law and under previous holdings in admiralty an appeal constitutes a trial de novo. In considering the applicable rule on a petition for certiorari where no cross-appeal was filed, the Court distinguished three cases where this Court had refused to consider rulings of the lower court where no cross-appeal was filed. This Court went on to say:

> "These decisions simply announced a rule of practice which generally has been followed; but none of them deny the *power* of the court to review objections urged by respondent, although he has not applied for certiorari; if the court deems there is good reason to do so."

It is significant to note that Finding of Fact No. 4 (R. 166) finds that the bankrupt delivered over to the Trustee in Bankruptcy the sum of $27,400.00. The Court then, in its Conclusions of Law (R. 167) strikes the affidavit of the Bankrupt. This is particularly significant in view of the fact that Petitioner has cited the case of *Morley Constr. Co. v. Maryland C. Co.*, 300 U.S. 185 (1937). In that case the Supreme Court granted certiorari for the particular purpose of fixing the measure of relief, if any, available to a non-appealing suitor. After laying down the general rule that an appellee in the absence of a cross-appeal may

urge matters ignored by the court, this Court said: (P. 191.)

> "Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment."

Without further unduly lengthening this reply, it is apparent from an examination of the authorities cited by the Petitioner and from the facts in the instant case:

1. That the relief prayed for by the Petitioner in the amount of $36,000.00 was not allowed by the District Court, but he was allowed only $27,400.00.

2. That his urging that the Circuit Court of Appeals consider the ruling of the trial court on the admissibility of the affidavit of the Bankrupt, without taking a cross-appeal, which affidavit alleged that the Bankrupt had turned over to the Trustee the sum of $36,000.00, was an effort by appellee to enlarge his rights and to ask the Circuit Court of Appeals to change Finding of Fact No. 4 as found by the trial court.

3. That under the holdings of this Court the Circuit Court of Appeals is not bound as a matter of right to consider alleged errors in the absence of a cross-appeal but has the power to do so if it sees fit, provided the same does not enlarge the rights of the appellee. The Court in the instant case did not see any good reason for going into the admissibility of the affidavit.

* * * * *

There is a more potent reason why the Court could very reasonably have refused to consider the affidavit, because

it very plainly was not admissible. We know of no case holding that an ex parte affidavit given by a bankrupt after title has passed and where the bankrupt is deceased is admissible. However, there is considerable authority to the contrary. *International Refugee Association v. Maryland Drydock Co.*, 179 Fed. 2d 284; *Stoehr v. Miller*, 296 Fed. 414; *Columbia Casualty Co. v. Thomas*, 100 Fed. 2d 151; *Stevens v. Howells Sales Co.*, 16 Fed. 2d 805; *Vendetti v. U.S.*, 45 Fed. 2d 543; *United States Fidelity & G. Co. v. Commercial Nat. Bank*, 55 Fed. 2d 564; *Pandolfo v. U.S.*, 286 Fed. 8, cert. den. 261 U.S. 621; *Karpathiou v. Schlotfeldt*, 106 Fed. 2d 928; *Brenneman v. Dillon*, 129 N.E. 564, 296 Ill. 140; *Independent Packing Co. v. Burns*, 168 Ill. App. 482; *6 American Jurisprudence*, page 1265, Section 1192; 53 ALR 650; *20 American Jurisprudence*, page 518, Section 604; *M'Iver v. Kyger*, 3 Wheat. U.S. 53; *Whitmore v. Murdock*, 29 Fed. Cases No. 17,509; *In Re Haynsworth*, 34 Fed. 2d 334; *Myers v. Kinzie*, 26 Ill. 36.

Thus, since the affidavit was not admissible in the first instance, nothing could have been gained by the Court giving consideration to it. Petitioners have cited no authority to the effect that the Court committed any error because the affidavit was admissible. Even assuming, for the sake of argument, which we deny, that the Court was under a duty to consider the ruling of the trial court and pass upon it with regard to the affidavit, it would seem that same falls into the category of harmless error where it would not in any way change the outcome of the litigation.

B. TRUSTEE'S DUTY UNDER A TURN-OVER ORDER

Under this proposition Petitioner cites the case of *Zartman v. First Natl. Bank*, 216 U.S. 134 (1910), which is not applicable to the instant case because in that case the court

merely held that a contract could be reformed where there had been a mutual mistake in preparing it. The bankrupt had owned the property prior to the bankruptcy and the trustee merely took title subject to the same equities as the bankrupt had. No one can dispute that proposition.

Petitioner also cites the case of *Watchmaker v. Barnes*, 259 Fed. 783 (1st Cir. 1919), where the Court charged the defendants with reasonable diligence to an inquiry concerning the forgeries committed by the bankrupt. The court sustained a judgment against the defendants and in favor of the trustee.

* * * * *

In the instant case the Court pointed out in its opinion (App. 4a):

> "But petitioner's proof that he had been so defrauded by Knetzer was not enough to establish the preference he sought over the other creditors. Most of the claimants in this bankruptcy matter had also been defrauded by Knetzer's representations that he would sell and deliver to them automobiles and tractors which Knetzer knew he could not deliver. But by these representations Knetzer induced them to make large deposits on the purchase price of automobiles and tractors which they ordered. Jaffke himself had been so defrauded by Knetzer to the extent of $11,300.00, for which Jaffke's attorneys filed for him a general claim with the trustee in bankruptcy."

Petitioner admitted that prior to the time he ever gave any money to the bankrupt he had received a letter from the Trustee which showed claims in the amount of $3,844,000.00, and that he knew that the Bankrupt was under an order to turn over $250,000.00 to the Trustee. In fact, he admitted giving to the Bankrupt the sum of $3,800.00 to be paid, so he was told, on the turn-over order to the Trustee.

It was quite obvious that a bankrupt who had handled millions of dollars should have had funds on hand at the time of bankruptcy. The Bankrupt did not appeal the turn-over order of $250,000.00. Surely, if he had not had the money at that time, he would have appealed that order. No one can now make a collateral attack upon that order. It is ridiculous to say that when the Bankrupt brought cash to the Trustee to be applied on the turn-over order, that the Trustee should make a search to determine the source of the funds. It is significant to note that the Petitioner in the instant case testified as a witness for the Bankrupt in a trial in which the Bankrupt was convicted in the United States District Court for concealment of assets, some three years after Petitioner claims that he gave the money to the Bankrupt. (R. 122-123.)

We believe the Circuit Court of Appeals correctly decided this issue, which is certainly not in conflict with any other opinions of this Court or any Circuit Courts of Appeal.

The case of *Maggio v. Zeitz*, 333 U.S. 56 (1948), cited by Petitioner, is not authority in this connection, because in that case, upon an appeal by the bankrupt, this Court properly held that a bankrupt could no longer be punished where it was obvious that he did not have the power to comply with the turn-over order.

In the instant case the Bankrupt was never purged of his contempt nor did he resort to appeals to this Court to relieve him of the payment of the $250,000.00. The Trustee had a perfect right to assume that he was still concealing that amount of money, and had a perfect right to collect it.

Petitioner's statement that the burden was on the Trustee to show the source of funds, rather than upon the

Petitioner to establish by clear and convincing evidence that the money which he gave to the Bankrupt came into the hands of the Trustee is certainly not the law. All of the authority on this subject is to the contrary. *Remington on Bankruptcy,* 5th Ed. 1953, Sec. 2480, Vol. 5A; *Schuyler v. Littlefield,* 232 U.S. 707, p. 713; *John Deere Plow Co. v. McDavid,* CCA 8th, 1905, 137 Fed. 802; *In Re Harigan Supply Co.,* CCA 8th, 1924, 2 Fed. 2d 791, p. 792; *In Re A. D. Matthews & Sons,* CCA 2nd, 238 Fed. 785.

In fact, the opinion of the Court is the best answer to this matter of tracing, and, without re-printing the same, we call the Court's attention to the third paragraph of the Circuit Court of Appeals' opinion on page 6a of the Appendix.

CONCLUSION

Respondent respectfully submitts that the petition for certiorari should be denied.

Respectfully submitted,

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